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In The

Supreme Court of the United States

October Term, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,

Appellant,

v.

JUNE M. BETTS,

Appellee.

On Appeal from
the United States Court of Appeals
for the Sixth Circuit

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Whether a benefit plan that predates applicability of the Age Discrimination in Employment Act ("ADEA") can be a "subterfuge" to evade the purposes of the act.

2. Whether the ADEA prohibits a benefit plan from terminating disability benefits when a disabled member becomes eligible for retirement benefits, or requires benefit plans to provide disability benefits in perpetuity.

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INTEREST OF AMICUS CURIAE

Amicus Curiae State of California operates the State Teachers' Retirement System ("California STRS") and respectfully submits this brief, by its Attorney General, pursuant to Rule 36.4, United States Supreme Court Rules.

California STRS is the retirement program of the State of California for educational employees. Its origin traces to 1895, when the California Legislature created a "School Teachers' Annuity and Retirement Fund" for the benefit of teachers in California's public schools. Cal. Stats. 1895, ch. 166, p. 170.

California STRS is the largest teacher's pension system in the United States, ranks fourth among public pension funds, and is the eighth largest pension system in the nation. Pensions & Investment Age, Jan. 25, 1988, p. 18. Its fund exceeds $23 billion in assets, servicing over 428,000 people. *Id.*, p. 26; California Teachers' Retirement Board, 1987 Annual Report, p. 38.

State law governing California STRS contains no provision for mandatory retirement. A member may retire as early as age fifty-five. Cal. Ed. Code, § 23901. A member may also apply for and receive disability allowance benefits if unable to perform his or her duties due to mental or physical incapacity. Cal. Ed. Code, § 22122, 23902, 23903. Under California Education Code § 23911, the disability allowance of a disabled employee unable to perform his or her duties, and who is without dependent children, terminates at age sixty and the member is eligible for retirement benefits. However, a disabled retirant retains the right to resume his or her previous employment and to reenter the system upon rehabilitation, or a retirant may choose to continue to receive retirement benefits and

to work and earn additional wages. Cal. Ed. Code, §§ 23913, 23919.

The California Legislature enacted STRS's disability allowance plan in 1972. Cal. Stats. 1972, ch. 1089, § 9, p. 2032; Cal. Ed. Code, § 23902 (former Cal. Ed. Code, § 14213). In 1974 Congress extended the Age Discrimination in Employment Act (29 U.S.C. 621 et seq.; "ADEA") to state and local governments. Pub. L. No. 93-259, 88 Stat. 74 (May 1, 1974). Like Appellant Public Employment Retirement System of Ohio, California STRS relies on the provisions of § 4(f)(2) of the act, 29 U.S.C. § 623(f)(2), to establish the lawfulness of its disability benefit plan.

Were this Court to affirm the decision of the Sixth Circuit that a benefit plan predating applicability of the ADEA may be deemed a "subterfuge" under ADEA, that holding would apply as well to California STRS. Further, appellee Betts is arguing a benefit plan that does not provide for disability benefits after a specified age constitutes "involuntary retirement" in violation of the ADEA. Were this Court to accept her argument, it might well apply also to California STRS.

STATEMENT OF THE CASE

Amicus adopts appellant's statement of the case.

SUMMARY OF ARGUMENT

1. The ADEA was adopted to eliminate age-based discrimination in the workplace. However, Congress

sought, in the original 1967 enactment of the ADEA and in the 1978 amendment to the law, to preserve for employers the flexibility to fashion a variety of benefit plans. The ADEA therefore exempts such plans from the prohibition of age-based differences. While the exemption is not available to a plan constituting a "subterfuge" to evade the ADEA, the language of the statute, this Court's previous interpretation of that language, and the legislative history make clear that "subterfuge" means a device adopted for the purpose of evasion, and no subterfuge can be found in a plan that predates applicability of the ADEA to the employer.

2. The 1978 amendment to § 4(f)(2) of the ADEA was intended solely to prohibit the involuntary retirement of willing and able employees who were performing the duties of the job. The amendment was not intended to alter the rights of persons disabled from performing their duties. The contrary construction urged by appellee amounts to a rule that employers who offer disability benefits must do so for the lifetime of the employee. Whether there should be such a departure from the principle of cost-based pension benefits should be decided by Congress after it weighs the effects on the likelihood employers will offer disability benefits, on employers' willingness to hire older workers, and on the potential unfunded liability of the nation's pension plans.

ARGUMENT

I

A BENEFIT PLAN THAT PREDATES APPLICABILITY OF A.D.E.A. CANNOT, AS A MATTER OF LAW, BE A SUBTERFUGE

With its enactment in 1967, the ADEA prohibited arbitrary age-based discrimination in the private-sector workplace. The act declared it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1). One exception to this general prohibition was, and continues to be, that an employer may "observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . ." ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2).

In 1977, this Court resolved a conflict among the circuits and held, inter alia, that a benefit plan established prior to the passage of the ADEA in 1967 could not be a subterfuge to evade the purposes of the act, rejecting any per se rule requiring an employer to show an economic or business purpose as then urged by the Secretary of Labor. *United Airlines, Inc. v. McMann*, 434 U.S. 192, 203 (1977). The Court held that a retirement plan that compelled involuntary retirement on the basis of age did not offend the strictures of the ADEA. The Court went on to interpret the subterfuge exception to § 4(f)(2), following the fundamental rule of statutory construction that requires a statute be given the plain meaning of its

words. The Court gave "subterfuge" its ordinary meaning – "a scheme, plan, stratagem, or artifice of evasion" – and reasoned that an employee would need "remarkable prescience" to scheme to evade an act passed years after implementation of the plan. *Ibid.*

This Court is asked to revisit the same question in light of the act's subsequent legislative history. It is urged that in 1978 Congress overruled *McMann* both regarding its involuntary retirement holding and regarding its conclusion that a benefit plan predating the act cannot be subterfuge. Mtn. to Affirm, pp. 3-4, citing to H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, reprinted in 1978 U.S. Code Cong. & Admin. News, 504, 529 ("plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.") Hence, appellee argues, an employer may only justify its plan by demonstrated cost considerations.

But a fair reading of that history and the specific language that Congress used when reenacting § 4(f)(2) leads to the inescapable conclusion that the legislative purpose of the amendment was to render involuntary retirements unlawful and not to address the criteria by which a benefit plan qualifies for the exception of § 4(f)(2). The amendment was not intended to alter "existing law with respect to" employee benefit plan practices. See e.g., H.R. Rep. No. 493, 95th Cong., 1st Sess. 5, reprinted in 1978 U.S. Code Cong. & Admin. News, 504,508; 124 Cong. Rec. H2276 (daily ed. Mar. 21, 1978) remarks of Rep. Weiss; 124 Cong. Rec. H2277 (daily ed. Mar. 21, 1978) remarks of Rep. Waxman; 124 Cong. Rec. S4450 (daily ed. Mar. 23, 1978) remarks of Sen. Javits.

But even more compelling is the very absence of any language in the reenacted § 4(f)(2), altering the term "subterfuge." As noted correctly in *E.E.O.C. v. Orange County*, 837 F.2d 420, 422 (9th Cir. 1988):

> [T]he 1978 amendment to section 4(f)(2) only dealt with involuntary retirement provisions. Congress could easily have invalidated *McMann* entirely by altering the definition of subterfuge or by adding a requirement that discriminatory plans be justified by cost considerations. We presume that Congress adopted *McMann's* definition of subterfuge when it reenacted 4(f)(2) without amending the subterfuge language.

Several other circuits have reached the same conclusion from the language Congress used. *Equal Employment Opportunity Commission v. Cargill, Inc.* ___ F.2d ___ (10th Cir., Aug. 26, 1988, Case No. 84-2692); *E.E.O.C. v. Maine*, 823 F.2d 542 (1st Cir., 1987); *E.E.O.C. v. Home Insurance Company*, 672 F.2d 252, 258 (2d Cir., 1982); *Alford v. City of Lubbock, Texas*, 664 F.2d 1263, 1271 (5th Cir., 1982); *Gonsalves v. Caterpillar Tractor Co., Inc.* 634 F.2d 1066 (7th Cir. 1980).

This Court's interpretation of the subterfuge provision of § 4(f)(2) remains valid notwithstanding the 1978 amendment to the ADEA. The Sixth Circuit's holding to the contrary simply cannot be justified in light of the provision's clear, unaltered language.

For the Ohio PERS benefit plan, which predates adoption of the ADEA by several decades (Jurisdictional Stmt., p. 3), how this rule is enunciated may be less important than for California STRS. Amicus respectfully

points out that the logic of this Court's definition of "subterfuge" dictates that a plan need not predate the act but need merely *predate applicability of the ADEA to the benefit plan in question*. No more "prescience" should be attributed to the California Legislature, when it enacted STRS's disability allowance plan in 1972, two years before Congress made the ADEA applicable to state and local government, than should be attributed to a private employer adopting a benefit plan in 1965, two years before the original enactment of the ADEA.

II

A BENEFIT PLAN MAY, IN COMPLIANCE WITH A.D.E.A., PROVIDE FOR DISABILITY BENEFITS TO TERMINATE WHEN A DISABLED MEMBER BECOMES ELIGIBLE FOR RETIREMENT BENEFITS

Appellee Betts argues that even if the Ohio disability retirement plan qualifies as a bona fide benefit plan under § 4(f)(2), and even if the challenged provision can be cost justified, it still violates the ADEA because it causes or permits "involuntary retirement" in violation of the act. Mtn. to Affirm, pp. 5-6. She asserts that denial of disability benefits to an employee over age sixty compels her instead to accept retirement benefits, which, she claims, constitutes involuntary retirement. Amicus submits that a plan may lawfully provide for cessation of disability benefits to a person eligible for retirement benefits and that such a provision does not amount to an involuntary retirement proscribed by the ADEA.

A. The Legislative Purpose of the ADEA Is to Prevent Involuntary Retirement of Able Employees, Not to Regulate the Benefits of Disabled Employees

Any analysis of the provisions of the ADEA in the context of disability and retirement benefits must begin with a recognition that Congress did not intend to disrupt plans that related benefits to the employee's age.

1. Age-Based Distinctions in Benefits Are Cost-Justified and Not Arbitrary

A person's health, fitness for employment, financial needs, and life-expectancy are all highly correlated with age. Benefit plans have therefore typically used schedules of benefits and member-contributions that conform to the differential experience of different age groups. Premiums for health insurance, life insurance, and similar protection rise as adults age. Benefits under various forms of insurance fall as the covered person enters age groups where the need for protection typically is lower or where the cost of providing coverage becomes too great. These distinctions are not arbitrary but reflect the underlying economics of operating benefit programs. See *International Brotherhood of Electrical Workers, Local 1439 v. Union Electric Co.*, 761 F.2d 1257 (8th Cir. 1985).

To provide otherwise, to price such programs identically and to provide the same schedule of benefits for all persons, regardless of age, would require younger adults to subsidize older adults. Congress presumably has the power to so order, but it had no such intent to depart from prevailing practices.

2. The Legislative History of the 1967 Enactment of the ADEA Makes Clear Congress' Intent to Permit Age-Based Distinctions in Bona Fide Benefit Plans

The problem of differential treatment by benefit plans was explicitly considered by Congress in 1967 in connection with the original enactment of the ADEA.

Senator Javits, who proposed the exemption contained in § 4(f)(2), expressed concern with the early drafts of the administration's bill because it did not "provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, . . . " Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 27 (1967). He also urged that "the age discrimination law should not be used as the place to fight the pension battle." *Ibid.*

Secretary of Labor Wirtz told Congress the bill's language was designed to protect the practices of existing benefit systems. *Id.*, p. 53; *see also* Hearings on H.R. 4221 et al. before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess., 40 (1967).

In floor debate, Senator Javits sought and obtained confirmation that "[a]n employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers." 113 Cong.Rec. 31255 (1967).

In the 1967 enactment, it is clear that Congress intentionally avoided any proscription of age-based distinctions in benefit plans in order to permit employers to continue to base benefits on the differential needs of employees of varying ages.

3. The 1978 Amendment to the ADEA Was Intended to Prohibit the Involuntary Retirement of Able Employees and Reflects No Departure from the Act's Original Intent Not to Invalidate Age-Based Distinctions in Bona Fide Benefit Plans.

The legislative history of the 1978 Amendment makes clear that Congress was addressing only the forced retirement of active, able-bodied employees.

> The committee believes that as a matter of basic civil rights people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about race, sex, or age. *A person with the ability and desire to work* should not be denied that opportunity solely because of age.
>
> . . . .
>
> *For capable older workers* the retirement decision should be an individual option. Maximum freedom of choice should be given to employees in deciding when to retire, *provided they are still physically and psychologically able to perform their jobs* in a satisfactory manner.

Sen. Rep. No. 493, 95th Cong., 1st Sess. 3, reprinted in 1978 U.S. Code Cong. & Admin. News, 504, 506 (emphasis added).

The express purpose of the 1978 amendment to § 4(f)(2) was to vindicate this "basic civil right" and to

overrule the result reached in *McMann:* that an *able-bodied, active and willing* airline pilot could be removed from the pilot's chair and forced into retirement solely on the basis of his age.

> In *McMann* v. *United Airlines,* 542 F.2d 217 . . . , the Fourth Circuit Court of Appeals held that section 4(f)(2) did not permit mandatory retirement pursuant to the terms of a collective bargaining agreement or pension plan. To rule otherwise, the Court said, would undermine the intent of Congress, because the purpose of 4(f)(2) was to encourage the employment of older workers by permitting employe[r]s to make distinctions based on age with respect to participation in employee benefit plans.
>
> . . . The amendment to section 4(f)(2) serves to express congressional approval of the result reached by the fourth circuit in *McMann.*

Sen. Rep. No. 493, 95th Cong., 1st Sess. 10, reprinted in 1978 U.S. Code Cong. & Admin. News, 504, 513. Plainly, the forced removal, on the basis of age, of a worker on the job and capably carrying out his or her duties is fundamentally different from cost-justified differences in benefit plans for those unable to work, and it was only the former that Congress sought to address:

> In the committee's view, forced retirement extinguishes an individual's right to employment and is thus not excused by section 4(f)(2) *unless the retirement is based on some reason* other than age, *such as disability* or poor performance.

Ibid. (emphasis added).

There is no evidence that the offense Congress took at the involuntary retirement of an able employee moved

it to alter the existing rules governing age-based variations in benefit programs. In fact, there is clear evidence to the contrary:

> Presently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advanced in age. This bill would not alter existing law with respect to these practices. Existing principles of law, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by *Id.*, p. 5, 1978 U.S. Code Cong. & Admin. News 508.

B. The Issue Is Not Involuntary Retirement But Whether Benefit Plans Are Required to Provide Employees Disability Benefits in Perpetuity

There should be no mistake about the rule appellee would have this Court promulgate. If an employer may not terminate eligibility for disability benefits on the basis of age, then each employer covered by the act may not provide any disability benefits unless the benefits are uniformly available in perpetuity. Plans that alter eligibility or benefit levels when the disabilitant becomes eligible for Social Security would now be unlawful. Plans that terminate disability eligibility when most able-bodied employees prefer to retire would now be unlawful. Plans that reduce benefits when disabilitants no longer have minor dependents would not be unlawful.

Had Congress intended in 1978 to create a right to lifetime disability benefits, one would expect to see some recognition of the vast implications of such a decision in the legislative history. Would the rule lead employers not to offer disability programs at all? Would it undermine

Congress' express purpose in enacting the ADEA of encouraging employers to hire older workers? Would it encourage the filing of fraudulent disability claims? Would it raise business costs and reduce employment?

These possibilities are undeniable. Perhaps Congress might choose to accept these risks after weighing such questions, but it is inconceivable that it would purposely do so without a shred of evidence in the record of its deliberations.

Appellee's claim of "involuntary retirement" arises because Ohio's benefit plan, like most, has taken care to ensure that disability eligibility does not terminate until the worker is eligible for other benefits, namely retirement benefits. Were the Ohio plan to provide that disability eligibility terminates before the disabilitant qualifies for retirement benefits, there would be no claim of "involuntary retirement." Once it is conceded that Congress did not prohibit plans that terminate disability benefits at a given age, it must also be conceded that the plan is no more in violation of the ADEA if it also provides retirement benefits at or before that same age. The issue is not "involuntary retirement" but the lawfulness of plans that terminate disability benefits any time before the death of the disabilitant.

C. To Hold Now That in 1978 Congress Required All Benefit Plans to Provide Lifetime Disability Benefits Would Create a Huge Unfunded Liability in the Nation's Pension Systems

The area of pension benefits is particularly ill-suited to creative interpretation of statutes and the finding of previously unknown rights. Appellant, like California

STRS and the other pension systems in the nation, could have provided unlimited disability benefits (or no disability benefits at all) had it been told to do so, but it would then have increased its contributions to pay for the increased cost of those benefits. But Congress did nothing in 1978 – or 1967 – to put the nation's pension systems on notice of any such obligation, and in fact gave all the indications reviewed above that it was doing nothing to upset long-established benefit plans. Accordingly, the systems have continued to collect contributions on the basis of their existing benefit schedules.

For this Court now to announce that the ADEA contains a hidden mandate that every benefit plan providing disability benefits do so for the lifetime of each member would create a huge unfunded liability for each of these systems.

This simply illustrates the fact that such a major change in what is perceived as unfair discrimination in benefit plans should be addressed by Congress and not the courts. Congress could fashion a statute that, for example, imposed a *prospective* requirement of longer disability benefits, giving pension systems time to adjust their contributions and distribution of benefits in a fiscally sound manner. Cf. *Florida v. Long*, ___ U.S. ___, 108 S.Ct. 2354 (1988).

CONCLUSION

Congress would not have adopted a sweeping new rule, requiring employers who offer disability benefits to make them available for the lifetime of the employee, without explicit recognition of the enormous effects such a rule would have. In the absence of any such evidence, it must be assumed that Congress did not depart from its expressed purpose of permitting age-based distinctions in disability benefit plans that predated applicability of the ADEA.

DATED: December 14, 1988

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